IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI

UNITED STATES OF AMERICA

V. **CRIMINAL NO. 3:08CR014-M-A**

ROBERT L. MOULTRIE,
NIXON E. CAWOOD,
CHARLES K MOREHEAD,
FACILITY HOLDING CORP d/b/a FACILITY MANAGEMENT GROUP, INC., FACILITY CONSTRUCTION MANAGEMENT INC., and FACILITY DESIGN GROUP, INC.

DEFENDANTS' MOTION TO EXCLUDE EVIDENCE OF OTHER CONTRACTS AND EVIDENCE OF "OTHER ACTS"

Defendants Robert L. Moultrie, Facility Holding Corp., d/b/a The Facility Group, Facility Management Group, Inc., Facility Construction Management, Inc. and Facility Design Group, Inc., through undersigned counsel, respectfully submit this as their Motion to Exclude Evidence of Other Contracts and Evidence of "Other Acts." Alternatively, this Court must require that the Government provide "reasonable notice" in advance of trial of any evidence of "other acts" in sufficient time that a hearing can be held as to its admissibility. As grounds for this motion, the defendants would show the following:

1. Fed.R.Evid. 404(b) provides that evidence of "other crimes, wrongs, or acts" are normally to be excluded from evidence except that:

> It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of

> mistake or accident, provided, that upon request of the accused, the prosecution, in a criminal case, shall provide reasonable notice in advance of trial… of the general nature of any such evidence it intends to introduce at trial.

This rule explicitly requires that, where a request is made by the defense, the prosecution must provide reasonable notice in advance of trial (reasonable here meaning two distinct things: for the notice to be "reasonable" it must be a reasonable time in advance of trial and a reasonably adequate description of the evidence) that describes the "general nature" of the evidence. The prosecution must tell the defense about any "other act" evidence far enough in advance of trial to give the defense—and this Court—a chance to deal with it.

2. On April 4, 2008, T.H. Freeland, IV, one of the lawyers for defendant Robert Moultrie wrote on behalf of all defendants requesting discovery in this case. A copy of that letter is attached as Exhibit A to this motion. Paragraph 16 at page 11 of this letter seeks disclosure relating to Federal Rule of Evidence 404(b). If it seeks disclosure of "other acts" evidence and whether the Government intends to use such evidence:

> 16. Pursuant to the Fifth and Sixth Amendments to the United States Constitution, Rules 12(b)(4)(B) and 16(a)(l)(D) of the Federal Rules of Criminal Procedure, and Rules 403 and 404(b) of the Federal Rules of Evidence, we request that, as soon as possible, the Government disclose all evidence of other similar crimes, wrongs, or acts, allegedly committed by any of the Defendants, upon which the Government intends to rely. If the Government intends to offer any such evidence, please set forth the date, place and nature of each "similar" act so that we can properly ask the Court for a determination concerning its admissibility pursuant to Fed. R. Evid. 403 and 404 and so as not to delay the case at trial.

This April 4, 2008, letter explicitly invokes the notice requirement of Fed.R.Evid. 404(b).

3. As of this date, the Government has not responded in writing to this letter. There has been no response in any form relating to the request for reasonable notice under Fed.R.Evid. 404(b).

4. Specifically, the government has provided no notice describing the "general nature" of any evidence of other acts by any defendant it may intend to offer.

5. What the Government has done is make voluminous document production, both in terms of delivery of a number of transfer boxes full of photocopied documents, and in terms of making available a room in the United States Attorney's office filled with yet more transfer boxes of documents. Among the documents in the boxes delivered to defense counsel were contracts between The Facility Group and government entities in other states.

6. For instance, the Government provided in discovery a copy of a Professional Services Agreement, a copy of which is attached as Exhibit B to this Motion. This is a construction management agreement involving a school district in Georgia; it is dissimilar in the services contracted for and in other respects to the contract that the Facility Group entered into with respect to the Mississippi Beef Plant. This contract is certainly an "other act" in the sense that it has nothing to do with the Mississippi Beef project or anything charged in the indictment. There is nothing in the discovery to suggest why the Government provided this contract, how it might be relevant to the case, or how it may be evidence of anything, including the "other acts" enumerated in Fed.R.Evid. 404(b).

7. This is not the only contract for an unrelated project produced in the Government's discovery.

8. Any evidence to be offered under this rule must be tailored to fit within the specific, enumerated exceptions in the rule. "[T]he various categories of exceptions—intent, design or plan, identity, etc.—are not magic passwords whose mere incantation will open wide the courtroom doors to whatever evidence may be offered in their names. To the contrary, each exception has been carefully carved out of the general rule to serve a limited judicial and prosecutorial purpose." *United States v. Goodwin,* 492 F.2d 1141, 1155 (5th Cir. 1974).

9. The Government provision of notice (which has not occurred) is only the first step for admission of other-act evidence. The comment to the Fed.R.Evid. 404 specifically notes that, where "other act" evidence is proposed, the Court must then make a Fed.R.Evid. 403 evaluation of admissibility: "The determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence in view of the availability of other means of proof and other facts appropriate for making decisions of this kind under Rule 403."

10. What this means is that if the Government were to provide notice, this Court must hold a hearing as to admissibility. The Fifth Circuit (en banc) has stated: "What the rule calls for is essentially a two-step test." This court must first determine "that the extrinsic-offense evidence is relevant to an issue other than the defendant's character." *United States v. Beechum,* 582 F.2d 898, 911 (5th Cir. 1978). Second, this Court must find the evidence has "probative value not outweighed by its undue prejudice" using the standard in Fed.R.Evid. 403. *Id.* To do so requires this court to compare the evidence offered to the conduct charged in this case and determine their similarity: "Similarity of the extrinsic evidence to the offense charged is the standard by which relevancy is measured under Rule

404(b)." *United States v. Duffaut,* 314 F.3d 203, 209 (5th Cir. 2002); *United States v. Gordon,* 780 F.2d 1165, 1173 (5th Cir. 1986). If the evidence is offered to show intent, the relevancy is determined by comparing the state of mind of the defendant with regard to both the charges in the indictment and as to the other-act evidence. *Duffaut,* 314 F.2d at 209.

11. There are essentially two groups of charges in this case: Charges that what appear on their face to be legitimate political contributions were the product of a conspiracy to bribe a public official, and charges that billings produced by The Facility Group constituted mail fraud. If the Government offers up "other act" evidence about political contributions, to make those contributions evidence of anything relevant to this case, the Government would have to show something about the factual context to demonstrate there was something inappropriate about those contributions. If the Government offers up "other act" evidence about other construction contracts involving The Facility Group or billings on those contracts, the Government would have to mount a "mini-trial" within this trial about the contracts or billings to show something inappropriate about that. Either type of proof would add enormously to the length and unwieldiness of a trial that the Government is already estimating will take as much as three weeks for their case alone.

12. Even more to the point on this motion, prior to the admission of such proof, this Court will be obligated to carry out a hearing to apply the two-part test required by *Beechum.* Any such hearing should occur well in advance of trial.

13. Obviously, this "character" evidence would be individual to each defendant—proof of "other acts" by one defendant shows nothing about another defendant who did not participate in those acts. For that reason, any "other act" evidence will heighten the issues relating to severance already before this Court. One uniformly recognized basis

for a severance is that a severance is appropriate where there is evidence admissible against one defendant but not others. In a leading case on the standard for motions to sever, the Supreme Court stated: "Evidence that is probative of a defendant's guilt but technically admissible only against a codefendant also might present a risk of prejudice." *Zafiro v. United States,* 506 U.S. 534, 539 (1993).

This the 23rd day of July, 2008.

/s/ T.H. Freeland, IV

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CERTIFICATE OF SERVICE

I hereby certify that on this day I have caused a copy of the foregoing to be electronically filed with the Clerk of Court using the CM/ECF system, which will automatically send e-mail notification of such filing to the following CM/ECF participant attorneys of record:

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